IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO.425 OF 1994

Dagadu Dharmaji Shindore
Age 52 years, Occ. Service,
Residing at 610, Raviwar Peth,
Pune - 411 002. .. Appellant
(Org. Accused)

Vs.

The State of Maharashtra .. Respondent

Mr. Shrikant Shivade for appellant.
Mr. V.B. Konde-Deshmukh, APP for Respondent-State.

CORAM : S.S. PARKAR & S.R. SATHE, JJ.

Date : December 23, 2004.

ORAL JUDGMENT (PER S.S. PARKAR,J.):

1. This appeal is filed challenging the Judgment and Order dated 29/4/1994 delivered by the Additional Sessions Judge, Pune in Sessions Case No.432 of 1991 convicting the appellant for the offences under Sections 302 and 307 of IPC.

2. Briefly stated the prosecution case is as follows:-

. The accused along with his wife and two children, son and daughter, were staying together in Raviwar Peth, Pune. Accused was working as driver. The incident took place in the morning of 12/4/1991

between 7 and 7.30 a.m. Prosecution case is that in the morning of the incident the accused brought the milk and thereafter when his wife was in the bathroom he cut the throats of his daughter Manisha and thereafter of his son Ganesh with a razor blade. Hearing their cries, wife came out of the bathroom. The accused then injured his wife also on her neck with the blade. She some how resisted and, therefore, escaped a fatal assault on her. The accused thereafter tried to kill himself by the use of same blade. The son and daughter were assaulted by the accused while they were in their sleep. Hearing shouts of wife, neighbours rushed to the place of the incident. The accused went to the loft of his house. Complainant PW 2 thereafter went to the Subhanshah Police Chowky and informed PW 7 Police Constable Jadhav and PW 8 Police Head Constable More about the incident. The entry was made in the station diary at the police station on the basis of what the wife PW 2 Vijaya had told the police. PW 7 Constable Jadhav went along with the complainant to her house. He saw that one boy and a girl were lying in a pool of blood and accused was on the loft of the house. The accused was alive but unable to speak. He was also having injuries on his neck and other parts of the body. He was brought down in a bed-sheet. Accused and his wife

were sent to Sassoon Hospital immediately. The other police officials came on the scene. Constable Jadhav went to Subhanshah Police Chowky and narrated the incident to Duty Officer. Head Constable More rang to Faraskhana Police Station and informed about the incident to the Duty Officer there. The Police Inspector Ingale of Faraskhana Police Station went to the place of incident. He asked PSI and other police to guard the spot and he himself rushed to the Sassoon Hospital where accused and his wife were brought. He made enquiry with Vijaya, wife of the accused. As she was in a position to make a statement, her statement was recorded which is at Exh.54. Her complaint was sent to Faraskhana Police Station and the crime was registered. Thereafter inquest panchanamas were drawn on the dead bodies which are Exhs. 7 and 8 and photographs of the different parts of the bodies were taken. The blood stained clothes of the complainant were seized under seizure panchanama Exh.9. P.I. Ingale visited the ward where the accused was admitted but found that he was unable to speak. His clothes were seized under seizure panchanama Exh.10. Thereafter spot panchanama Exh.16 was drawn. Under spot panchanama the blades, mirror, blood stained clothes etc. were seized.

3. In the course of the investigation statements of the witnesses were recorded. The accused was referred to E.N.T. surgeon. The same morning emergency operation was performed on him. The dead bodies of Ganesh and Manisha were sent for post mortem examination. On 14/4/1991 statement of the accused was recorded by PW 1 in the hospital. As the accused was unable to talk, the questions were written by the Magistrate and accused replied in writing. He has signed the said statement which is Exh.15. The accused was thereafter referred to Psychiatric Department on 13/4/1991 and 19/4/1991. The accused was discharged on 1/5/1991 and he was shown arrested. The Special Judicial Magistrate Adhav PW 11 had recorded the statement of the complainant under Section 164 of Cr.P.C. on 13/5/1991 on the basis of the requisition letter issued by Faraskhana Police Station. Accused was produced before the Magistrate on 17/5/1991. His confessions recorded by the Magistrate are produced at Exhs.45 and 46. The seized articles were sent to C.A. for examination. After the investigation was completed, charge-sheet came to be filed against the accused for the double murder and also attempt to murder his wife. The case was committed to the Sessions Court on 1/8/1991.

4. Before the Sessions Court, charges were framed against the accused for offences under Sections 302 of IPC for the murders of his son Ganesh and of his daughter Manisha separately. He was also charged for offence under Section 307 of IPC for the assault on his wife Vijaya and lastly for offence under Section 309 of IPC for attempting to commit suicide. As the accused pleaded not guilty to the charges framed against him, on behalf of the prosecution 13 witnesses were examined which include Complainant Vijaya Shindure PW 2, the wife of the accused. The other witnesses included PW 1 Shalini Phansalkar, the JMFC who had recorded the statement of the accused and PW 11 Kamalakar Adhav, the Special Executive Magistrate, who had recorded the confession of the accused under Section 164 of Cr.P.C. The neighbours like PW 3 Brijkumar Somani, PW 4 Balu Kudale and PW 5 Dagadu Dimbale have been examined. The prosecution has also examined doctors who had examined the complainant and accused and the doctor who performed autopsy on the dead bodies. PW 6 Dr. Amod Talavalikar had examined the complainant and issued injury certificate. PW 10 Dr. Avinash Nagpure had examined the accused. PW 12 Dr. Vasudeo Paralikar is a Psychiatrist to whom the accused was referred for psychiatric treatment.

Lastly, PW 13 is P.I. Ingale, who investigated the case. The defence of the accused was of denial. In the written defence given by the accused his case is that some stranger had assaulted all the members of the family including himself and had run away.

5. After considering the evidence on record, the trial court convicted the accused on the basis of statement of the accused which was treated as his confession and the extra judicial confession made to the Psychiatrist. The trial court has also relied on the blood stains of the deceased son and daughter found on his half pant as per C.A. report and the entry made by the constable at the police station about the information given by the wife of the accused involving the accused for the murder and the assault. The trial court has not relied on the confessional statement of the accused recorded by the Special Judicial Magistrate under Section 164 of Cr.P.C. on the ground that it was inadmissible as the conditions under Section 164 were not complied with. The trial court convicted the accused separately for offence under Section 302 for the murder of his son and daughter and for each murder imposed sentence of life imprisonment and to pay a fine of Rs.500/- in default

RI for six months. He was also convicted for offence under Section 307 of IPC for attempt to commit murder of his wife Vijaya and sentenced to RI for 7 years and to pay a fine of Rs.500/- in default RI for six months by the impugned judgment and order dated 29/4/1994. The said order of convictions and sentences is challenged by the appellant-accused in this appeal.

6. Mr. Shivade, the learned advocate appearing on behalf of the appellant, has contended that there is no legal evidence before the court for convicting the accused. He has challenged the reliance by the trial court on the alleged dying declaration of the accused as well as his extra judicial confession made to Psychiatrist as illegal on the ground that those statements were not admissible in evidence as the provisions of law were not strictly complied with. As regards the station diary entry made by the constable on the basis of the information given by the wife of the accused it is contended that the wife having not stated that she had given such information to the constable that entry cannot be relied on as substantive piece of evidence. Lastly, he has contended that so far as the finding of the blood of

the deceased on the half pant of the accused is concerned, the same cannot be relied on as it was not put specifically to the accused in his examination under Section 313 of Cr.P.C. and sought his explanation.

7. Immediately after the incident in question the wife PW 2 had gone to the police station to call the constable for seeking help for getting medical aid for her children who were lying in a pool of blood. The constable before going to the house of the complainant made entry in the station diary. After seeing the condition that two children were lying in a pool of blood and the complainant and the accused were injured the constable went back to the police chowky and informed the Faraskhana Police Station on telephone about the incident. Thereafter he along with Head Constable went to the house of the complainant. That time Investigating Officer P.I. Ingale had arrived at the scene of offence. The complainant and accused were already sent to the Sassoon Hospital for treatment as they were injured and were alive. The Investigating Officer P.I. Ingale went to the Sassoon Hospital and recorded the complaint of wife Vijaya and sent the same to the Police Station and crime was

registered. The accused was also admitted in the Sassoon Hospital but he was unable to speak. He was immediately referred to E.N.T. surgeon and had undergone operation. In the F.I.R. wife had implicated her husband. However, in the court she had completely departed from her complaint and made to appear that some third person had assaulted all the members of the family. Since the wife, the only eye witness, has not supported the complaint there is no substantive evidence against the accused and, therefore, F.I.R. which can only be used for corroboration or contradiction of the person who lodges it cannot be the basis for prosecution. The trial court has, therefore, relied only on the alleged dying declaration and the extra judicial confession of the accused and the station diary entry and the finding of blood on the half pant of the accused.

8. So far as the confession of the accused under Section 164 of Cr.P.C. is concerned, the same was recorded by PW 11 Special Judicial Magistrate Adhav. The said confessional statements are produced by the prosecution as Exhs.45 and 46. Exh.45 contains the answers given by the accused during his preliminary enquiry and Exh.46 contains confessional statement of

the accused. The same has not been relied on by the trial court as being inadmissible in evidence on the ground that the accused was under the pressure of the police at that time. The said confession was recorded in the presence of P.I. Ingale and other police staff. At the relevant time accused was tied with a rope and the rope was held by the police constable. The trial court has also observed that the Magistrate had not complied with the mandatory provisions of Section 164 of Cr.P.C. It is well settled law that the confession of the accused cannot be relied on unless the conditions laid down under Section 164 of Cr.P.C. for recording such statement are strictly complied with.

9. So far as the confession of the accused recorded by PW 1 Sou. Shalini Phansalkar is concerned, the same was recorded pursuant to the requisition made to her by the police. At that time PW 1 Phansalkar was J.M.F.C. She had received the requisition from Investigating Officer on 14/4/1991 to record the dying declaration of the accused, who was admitted to Sassoon Hospital. She went to Sassoon Hospital at about 6 p.m. and disclosed her identity to Dr. Nagpure who was present there. The patient

(accused) was conscious but was unable to speak. She gave questions to him in writing and the accused gave answers in writing. The same is produced at Exh.15. At the relevant time because of the serious injuries received by the accused, it was felt that he might not survive and, therefore, necessity was felt to record his statement, which may be used as dying declaration. However, the accused having survived, the said statement cannot be treated or used as dying declaration within the meaning of Section 32 of the Evidence Act.

10. In this respect reliance was placed by the defence advocate on the judgment of the Supreme Court in the case of Maqsoodan and ors. vs. State of U.P. reported in **1983 Cri. L.J. 218**. There are also judgments of the High Courts as well taking similar view. The trial court has, however, treated the statement of the accused as confession of the accused or an extra judicial confession made by the accused and placed reliance on it to base the conviction of the accused. The learned defence advocate challenged the reliance on that statement of the accused as a confessional statement on the ground that in order to treat the said statement as a confessional statement

the provisions of Section 164 of Cr.P.C. ought to be complied with. He has placed reliance on some judgments of the High Courts and the Apex Court. Reference may be made, firstly, to the judgment of the Allahabad High Court in the case of Babbu vs. State reported in **1954 Cri.L.J. 1341**. In that case the appellant was convicted for offences under Sections 307 and 309 of IPC on the basis of the statement of the accused recorded after he had assaulted his wife seriously. He had inflicted injuries on himself also in order to end his own life after assaulting his wife. Apprehending that he might die, his statement was recorded. After he survived, reliance was placed on the said statement by the prosecution as a confessional statement. He was convicted by the trial court but in appeal the Division Bench of the High Court held that said statement cannot be taken as a confession of the accused as the provisions of Section 164 of the Cr.P.C. would be applicable and the same having not been complied with, the said statement cannot be used against the accused.

11. Reliance was also placed on the judgment of the Privy Council in Nazir Ahmad’s case in which it was observed that when a thing is required to be done

in a particular manner, the same should be done in that manner otherwise it cannot be relied. Similar view was taken by the Andhra Pradesh High Court in the case of In re Mannem Edukondalu reported in **AIR 1957 Andhra Pradesh 729**. That was also a case where the Sessions Court had relied on the statement of the accused which was recorded by the Sub-Magistrate of Guntur. As the provisions laid down under Section 164 of Cr.P.C. were not followed for recording the confessional statement, it was held that the statement of the accused which was inculpatory cannot be treated as confession under Section 164 of Cr.P.C. In both the aforesaid decisions the view taken is that while recording dying declaration, if the Magistrate found that accused is making statement which is self inculpatory, the Magistrate cannot record it without following the mandatory provisions of Section 164 of Cr.P.C. In this case the trial court seems to have taken the view that said statement could be treated as extra judicial confession which is wrong.

12. It is contended that so far as the said dying declaration is concerned, the same cannot be even treated as extra judicial confession as the accused was not making voluntary statement at that time but

pursuant to enquiry made by a Magistrate. Incidentally, the Magistrate happens to be a Judicial Magistrate because he was at the relevant time JMFC who was empowered to record the dying declaration. Reference is made to the admissions of I.O. P.I. Ingale PW 13 and evidence of Dr. Nagpure PW 10. P.I. Ingale has admitted that though accused was arrested after his discharge from the hospital on 1/5/1991, when he was in the hospital he was continuously in the physical custody of the police who were guarding him of which the accused was aware. Similarly Dr. Nagpure PW 10 has deposed that the police had made arrangement so that the appellant should not abscond and, therefore, handcuff was put to his leg and to the cot. In other words while in the hospital the leg of the accused was tied to the cot of the hospital on which he was kept. Normally, extra judicial confession is made outside court, even before the accused is arrested, to a person of his confidence. Surely the JMFC who had gone to record the dying declaration on the requisition made by the police was not known to the accused to whom he would confess about the offence committed by him. The Magistrate had told him that he was the Magistrate and had gone there to record his statement. Therefore, the accused at that time was quite conscious that he was making a

statement to a person in authority. Section 26 of the Evidence Act bars admissibility of the confession made by a person in the custody of the police officer unless it was made in the immediate presence of a Magistrate which could be proved against him. In our view, the presence of Magistrate contemplated under Section 26 of the Evidence Act cannot be other than the Magistrate following the mandatory provisions of Section 164 of Cr.P.C. That time the accused was not informed that he was not bound to make a statement and that any statement made by him could be used against him as observed in the case of Babbu Vs. State (Supra). In our view the statement of the accused which was recorded as dying declaration, for the aforesaid reason, cannot be used against him as a confession of the guilt made by the accused. In the case of Ranesh Timmanna Sargankallawaddor vs. The State of Karnataka reported in **1991 Cri.L.J. 1793**, the Division Bench of the Karnataka High Court had taken view that dying declaration made by witness cannot be used as substantive evidence if he survives and it could be used only for the purpose of contradicting him and not for any other purpose as contemplated under Section 162 of the Cr.P.C.

13. So far as the statement made to the Psychiatrist Dr. Paralikar PW 12 and recorded by him in the presence of police is concerned, it is contended that the same cannot be said to be voluntary because of the presence of the police. Dr. Paralikar PW 12 in his evidence has admitted that when the patient (accused) was taken to him he was accompanied by two policemen, one head constable and another constable and throughout the interview those two policemen were with the patient. He has further admitted that when the patient was narrating the history to him and he was taking down the notes, those two policemen were by the side of the patient (accused). Dr. Paralikar has also stated that at that time accused was telling him that he had to attend the marriage of his daughter and, therefore, he had to go. This shows that the accused was not in his proper state of mind. He was under hallucination that he had to attend the marriage of his daughter who had died earlier in the course of the incident which took place in his house on 12/4/1991.

14. In this respect reliance is placed on a number of decisions by the defence advocate, some of which can be referred to here. In the case of Vistari

Narayan Shebe and anr. vs. State of Maharashtra and anr. reported in **1978 Mh.L.J. 244**, the Division Bench of this Court was considering the confession made to Police Patil which was held to be inadmissible. After considering the various decisions of the Supreme Court and of the Privy Council, the Division Bench had held that in the light of the law laid down by the Supreme Court the statement alleged to have been made by the accused to Police Patil was inadmissible. It was further held in para 15 of the judgment that the legal position is that a statement in the nature of a confession made to or in the presence of police is inadmissible. It was, therefore, argued by defence advocate that though the statement was made by the accused during the course of an enquiry by the Psychiatrist in this case which was noted down by him, the same was made in the presence of a head constable and one constable and, therefore, the said statement recorded by Psychiatrist at Exh.37 cannot be relied on as an extra judicial confession.

15. Reference may also be made to the decision of the Division Bench of this Court in the case of Emperor vs. Mallangowda Parwatgowda reported in **XIX BLR 683**. The question before the Division Bench was

whether certain extra judicial confession said to have been made by the accused to one Kumarapa in the presence of the Sub-Assistant Surgeon in the dispensary was admissible in evidence or should be excluded under Section 26 of the Indian Evidence Act. It was held that it was wrongly admitted in evidence as a confession. In that case the accused no.1 was at the material time in actual physical custody of two policemen who were guarding him when he was taken to the Magistrate. Police were there for no other purpose than to guard him or prevent his escape and, therefore, the court held that it was impossible to say that he was not in the custody of the two policemen who were accompanying him and, therefore, the statement was hit by Section 26 of the Evidence Act and consequently inadmissible in evidence. In the instant case, as admitted by the Psychiatrist, the accused was accompanied by two policemen. Similar view has been taken by the Supreme Court in the case of Jaharlal Das vs. State of Orissa **I(1992) CCR 420 (SC)**. The extra judicial confession on which reliance was placed in that case was supposed to have been made in the presence of the police. The Supreme Court upheld the view of the trial court observing that that part of the prosecution case regarding alleged extra judicial confession was rightly rejected.

16. From the aforesaid cases, it is clear that presence of police near the accused where his statement was recorded would make such statement inadmissible by virtue of Section 26 of the Evidence Act. In this case Dr. Paralikar having admitted that he was examining and questioning the patient (accused) and the patient had made the inculpatory statement in the presence of the two police constables, the inculpatory statement recorded by Dr. Paralikar cannot be used as extra judicial confession being inadmissible by virtue of Section 26 of the Evidence Act.

17. The last circumstance relied on by the trial court against the accused is that the half pant of the accused was seized under seizure panchanama which was blood stained and the same was sent to C.A. and as per the C.A. report Exh.64 the blood detected on the half pant of the accused gave reaction for blood groups "A", "B" as well as "O". The blood group of the accused is "B" while that of his wife complainant is "A". The blood group of daughter Manisha was "O" and his son Ganesh was "A" or "B". In our view, first

of all this circumstance by itself cannot be the basis of conviction in as much as all the four members of the family were at the relevant time injured and, therefore, accused could have easily come into contact with the blood of his own children, particularly when the constable had used the bed-sheet (chadar) which was lying near the two dead bodies in a pool of blood for wrapping it around the accused before he was taken to the hospital. The learned defence advocate has also contended on the basis of the authorities that in his 313 statement this circumstance was not put specifically to the accused and his explanation sought and, therefore, that cannot be used against the accused. We have gone through the 313 examination of the accused and found that general question was put to him about the C.A. report without putting it to him that on his half pant there was blood of the group of his daughter which was "O", while his blood group was "B". There is not even question put to him with regard to seizure of his own blood stained half pant. In view of the above, reliance cannot be placed on the said circumstance against the accused.

18. The trial court has also placed reliance on the station diary entry made by the police when

complainant-wife had gone to the police station to call the police for the purpose of seeking their assistance for getting immediate medical aid for her two children. It seems that the said entry was made by the police on the basis of what complainant wife had told them at that time and as per the said entry the complainant had told them that accused had assaulted her children, herself and himself. In our view that entry could only be used as a corroborating circumstance and not as a substantive piece of evidence. Moreover, the complainant herself has not stated that she had given such information to the police that it was the accused who had assaulted the deceased and herself. No doubt the police constables also have been examined and they have stated what they were told by the complainant but that being statement made to the police, cannot be used as a substantive piece of evidence but could only be used to contradict the person who had made such statement to the police, that being the statement under Section 162(1) of Cr.P.C. In view of the above discussion we are of the view that there is no legal evidence on the basis of which the accused could have been convicted for offences under Sections 302 and 307 of IPC. In the circumstances, the order of conviction and sentence recorded by the trial court against the appellant is

liable to be quashed and set aside.

19. In the result, this appeal is allowed. The order of conviction and sentence recorded by the Addl. Sessions Judge, Pune against the appellant-accused in Sessions Case No.432 of 1991 by the impugned judgment and order dated 29/4/1994 is quashed and set aside and the appellant-accused is acquitted. His bail bond shall stand cancelled.

(S.S. Parkar, J.)

(S.R. Sathe,J.)